Supreme Court, U.S.
FILED
AUG 15 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1129

In The

Supreme Court of the United States

October Term, 1986

PAUL E. JOHNSON,

Petitioner,

v.

TRANSPORTATION AGENCY, SANTA CLARA COUNTY, CALIFORNIA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

[redacted] **BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION, WILLIAM KIDD, AND EDWARD SWIDEN IN SUPPORT OF PETITIONER**

Of Counsel

RICHARD M. STEPHENS
Pacific Legal Foundation
555 Capitol Mall, Suite 350
Sacramento, CA 95814
Telephone: (916) 444-0154

RONALD A. ZUMBRUN
JOHN H. FINDLEY
*ANTHONY T. CASO
*COUNSEL OF RECORD
Pacific Legal Foundation
555 Capitol Mall, Suite 350
Sacramento, CA 95814
Telephone: (916) 444-0154

Attorneys for Amici Curiae

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

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This motion of William Kidd, Edward Swiden, and Pacific Legal Foundation for leave to file the annexed brief amicus curiae is respectfully made pursuant to Supreme Court Rule No. 36. Consent to the filing of this brief has been granted by counsel for petitioner; this consent has been lodged with the clerk of this Court. Consent has been withheld by counsel for respondent, Transportation Agency, Santa Clara County, California.

William Kidd and Edward Swiden are candidates for employment with the California Department of Fish and Game. In a manner similar to the Transportation Agency of Santa Clara County's 1978 affirmative action plan, the State of California has employed race and gender preferences in employment. California has attempted to justify these preferences as a step to eliminate race and gender imbalances not caused by discrimination. William Kidd and Edward Swiden have filed suit in California Superior Court to challenge the discrimination against them. The action is still pending. William Kidd and Edward Swiden have an interest in the outcome of the case before the Court because resolution of the issues will affect their rights against the State of California.

Pacific Legal Foundation is a nonprofit, tax-exempt corporation, incorporated under the laws of California for the purpose of participating in litigation affecting public policy. Policy of the Foundation is set by a Board of Trustees composed of concerned citizens, the majority of whom are attorneys. The Board of Trustees evaluates the merits of any contemplated legal action and authorizes such legal action only where the Foundation's position has broad support within the general community. The Foundation's Board of Trustees has authorized the filing of a brief amicus curiae in this matter.

Pacific Legal Foundation has participated in several cases which involved issues similar to that presented in this case. The Foundation's public policy perspective and litigation experience in support of individual liberties will help provide this Court with additional argument in light of the erroneous holding of the Ninth Circuit Court of Appeals in this matter.

For the foregoing reasons, William Kidd, Edward Swiden, and Pacific Legal Foundation request that the motion to file the annexed brief amicus curiae be granted.

DATED: August, 1986.

Respectfully submitted,

OF COUNSEL

RICHARD M. STEPHENS

RONALD A. ZUMBRUN
JOHN H. FINDLEY
*ANTHONY T. CASO
*COUNSEL OF RECORD

By _____
ANTHONY T. CASO

Attorneys for Amici Curiae

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INTERESTS OF AMICI

The interests of amici are set forth in the preceding motion for leave to file brief amicus curiae of Pacific Legal Foundation, William Kidd, and Edward Swiden in support of petitioner.

OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 770 F.2d 752 (9th Cir. 1985).

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STATEMENT OF THE CASE

Petitioner, Paul Johnson, was an applicant for a promotion by his employer, respondent, Transportation Agency of Santa Clara County, California (Agency). The Agency did not promote petitioner, but promoted Diane Joyce instead pursuant to the Agency's 1978 affirmative action plan. Petitioner filed suit for redress of a violation of Title VII's prohibition on sex discrimination.

The District Court held that petitioner was denied the promotion because of his sex and that Joyce was promoted because of her sex. The parties agreed that the competitive examinations which ranked petitioner higher than Joyce were fair.

The District Court held that the affirmative action plan was invalid because it was not designed to remedy past discrimination. The court held as a matter of fact that the Agency had not discriminated against women. Furthermore, the court found that the plan was illegal because the Agency had failed to prove that the plan was temporary. The plan had no termination date, yearly reviews were never conducted, and testimony of the Agency's

director indicated that the plan was intended to be permanent. The court also held that the Agency's actions unnecessarily trammeled the petitioner's interests and had the effect of an absolute bar to promotion. The court ruled for petitioner and the Agency appealed.

The Ninth Circuit Court of Appeals reversed. The court stated that an affirmative action plan need not be preceded by past discrimination to constitute a defense to a Title VII violation, but race and gender preferences may be imposed to achieve a race and gender balance of the employer's work force similar to the proportion in the area work force. The Court of Appeals also ruled that the plan was temporary because the purpose of the plan was to "attain" labor force parity and not to maintain balances. Furthermore, the court ruled that a pattern of exclusion of white males must be shown in order to prove that an affirmative action plan creates an absolute bar to advancement of males.

The petitioner petitioned this Court for a writ of certiorari. The petition was granted on July 7, 1986.

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SUMMARY OF ARGUMENT

The trial court found that the petitioner was not promoted by the Agency because of his gender, a reason prohibited by Title VII. However, this Court created an exception to the ban on discriminatory treatment by employers if the action is pursuant to an affirmative action plan which contains safeguards similar to those in *United Steelworkers of America v. Weber*, 443 U.S. 193 (1979).

The name "affirmative action" should not preclude a search for the substance and practical effect of the plan. Just as "a rose by any other name would smell as sweet," sex and race discrimination labeled affirmative action is as repulsive as historical segregation. W. Shakespeare, *Romeo and Juliet,* Act II, Scene ii, Lines 42-43. Only affirmative action plans which contain the protections and limits found in *Weber* should constitute a defense to otherwise indefensible discrimination.

Those safeguards include the requirements that the plan be designed to remedy present effects of past discrimination, be temporary and not designed to maintain race balances, and not allow an unnecessary trammeling of the interests of nonminority employees. The trial court specifically found as matters of fact that there was no past discrimination to remedy, that the plan was not temporary, and that the petitioner's interests were trammeled. The Court of Appeals' disregard of the need for past discrimination ignores the limits of this judicially created exception to Title VII. The reversal of the finding of fact regarding temporariness was also inappropriate. Finally, the Agency's affirmative action plan contains no constraints to protect the interests of nonpreferred workers, but rather encourages discriminatory treatment. Thus, the plan unnecessarily trammels the interests of male employees. Although the absence of any one of *Weber's* requirements would preclude use of the plan as a defense, none of the safeguards of *Weber* are present in this case.

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ARGUMENT

I

THE NINTH CIRCUIT ERRONEOUSLY HELD THAT THE AGENCY'S AFFIRMATIVE ACTION PLAN WAS REMEDIAL

Although a sex or race based promotion decision appears to be in conflict with Title VII's ban on discrimination, such a decision may be legitimate if made pursuant to an affirmative action plan which falls within the guidelines set by this Court in *United Steelworkers of America v. Weber*, 443 U.S. 193. The first saving grace of the race preference in *Weber* was that it was "designed to break down old patterns of racial segregation and hierarchy. Both [Title VII and the affirmative action plan] were structured to 'open employment opportunities for Negroes in occupations which have been traditionally closed to them.'" *Weber*, 443 U.S. at 208 (quoting 110 Cong. Rec. 6548 (1964) (remarks of Senator Humphrey)).

This requirement assumes several conditions. First, that the employer had been responsible for "racial segregation and hierarchy" and that employment opportunities were "traditionally closed." *Id.* Second, the requirement assumes that the hierarchy and segregation resulting from past discrimination is still in existence and that a race or sex preference is necessary to eliminate the vestiges of past discrimination. The fatal flaw in the Court of Appeals' decision is the presumption that race or gender preferences may be used to eliminate imbalances whether or not they are the result of discrimination. If the imbalances are not caused by prior discrimination, any attempt to eliminate those imbalances cannot be remedial.

The District Court held in its Findings of Fact that "[t]he Transportation Agency has not discriminated in the past, and does not discriminate in the present against women in regard to employment opportunities in general and promotions in particular." Appendix to Petitioner's Petition for Writ of Certiorari (Appendix to Petition) at 13a, Paragraph No. 22. Certainly, that finding is inconsistent with a claim that any employment opportunity was "traditionally closed" to women. Without past discrimination, there is nothing to remedy.

Respondent argues that the statistical gender imbalance needed a remedy. *See* Respondent's Brief in Opposition to Petition for a Writ of Certiorari at 4. Likewise, the Court of Appeals stated:

> "Statistics are extremely useful in showing a conspicuous work force imbalance. We note particularly the difficulty that may confront an employer whose plan is intended to remedy discrimination resulting from societal norms. Some forms of discrimination are so subtle or so accepted that they defy proof other than by statistics." *Johnson v. Transportation Agency*, 770 F.2d at 758.

The Court of Appeals suggests that an employer may discriminate in order to "remedy discrimination resulting from societal norms." *Id.* The court stated that "the district court's factual finding of no past or present discrimination against women by this employer is irrelevant to the issue of the validity of the affirmative action program." *Id.* at 758 n.4.

Such an interpretation eliminates the need for the preferences to be remedial. For constitutional purposes

not present in this case, "[s]ocietal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy." *Wygant v. Jackson Board of Education,* — U.S. —, 90 L. Ed. 2d 260, 270 (1986) (Powell, J.); *id.* at 277-78 (O'Connor, J., concurring). Although a Fourteenth Amendment challenge was not made in the present case, Title VII should not be construed so as to attempt to justify a constitutional violation.

This Court's decision in *Wygant* relied on *Hazelwood School District v. United States,* 433 U.S. 299 (1977), a Title VII case. *Wygant,* 90 L. Ed. 2d at 269. Statistical disparity may be evidence of prior discrimination and "gross statistical disparities . . . may in a proper case constitute prima facie proof of a pattern or practice of discrimination." *Hazelwood,* 433 U.S. at 307-08 (citing *International Brotherhood of Teamsters v. United States,* 431 U.S. 324, 339 (1977)). But statistical disparity is evidence of, not a substitute for, prior discrimination. In the present case, the trier of fact below concluded after reviewing all the testimony and evidence that, despite the imbalance, no prior discrimination existed. Furthermore, the Agency's plan states that "few women seek entry into [certain] positions" because of the "heavy labor" involved. Transportation Agency, County of Santa Clara, *Equal Employment Opportunity Affirmative Action Plan* at 16 (1978). It is unfair to prefer the few women who seek these positions merely because few women chose that walk of life. The Court of Appeals erroneously mistook a part of the evidence for the required conclusion.

Furthermore, this Court recently reaffirmed the Title VII requirement that race conscious employment practices must be remedial in *Local 28 of the Sheet Metal Workers'*

International Association v. Equal Employment Opportunity Commission, — U.S. —, 54 U.S.L.W. 4984 (July 2, 1986).

> "We have previously suggested that courts may utilize certain kinds of racial preferences to remedy past discrimination under Title VII. . . . The Courts of Appeals have unanimously agreed that racial preferences may be used, in appropriate cases, to remedy past discrimination under Title VII." *Id.* at 4991-92 (footnote omitted).

No past discrimination exists in this case.

The Court's companion decision in *Local No. 93, International Association of Firefighters v. Cleveland,* —U.S. —, 54 U.S.L.W. 5005 (July 2, 1986), does not eliminate the predicate of prior discrimination because the race preferences were voluntarily assumed by the employer, rather than court imposed. The Court specifically warned that

> "[t]his is not to say that the parties may agree to take action that conflicts with or violates the statute upon which the complaint was based . . . . [T]he fact that the parties have consented to the relief contained in a decree does not render their action immune from attack on the ground that it violates § 703 of Title VII . . . ." *Id.* at 5012.

Cleveland does not stand for the proposition that voluntary affirmative action is in any way exempt from the basic prohibitions on discrimination in the statute. "[W]e do not suggest that voluntary action by employers or unions is outside the ambit of Title VII . . . . The rights of nonminorities with respect to action by their employers are delineated in § 703 of Title VII." *Id.* at 18 n.11; *see also id.* at 5013 (O'Connor, J., concurring). The Court specifically addressed the limited issue of whether a consent decree is

subject to the limitations on court ordered relief in Section 706(g) of Title VII. 42 U.S.C. § 2000e-5(g). Unlike the *Cleveland* case, the petitioner is challenging the gender preference as a violation of Section 703 of Title VII. 42 U.S.C. § 2000e-2.

Various lower courts have not allowed the label of "affirmative action plan" to resolve the issue. In *Lilly v. City of Beckley,* 615 F. Supp. 137, 140 (W. Va. 1985), the court found that an affirmative action plan which was not for the purpose of remedying past discrimination did not justify suspect preferences. The court in *Janowiak v. City of South Bend,* 750 F.2d 557 (7th Cir. 1984), *petition for cert. filed,* 55 U.S.L.W. 3039 (June 10, 1985) (No. 84-1936), interpreted *Weber* to require past discrimination to justify race preferences. Statistical disparity is not enough. *Id.* at 563.

Title VII will justify race and gender preferences only if they are part of the plan designed to remedy a Title VII violation. Statistical imbalance is not a violation of Title VII. *See* 42 U.S.C. § 2000e-2(j). The trier of fact found no prior discrimination. It is important to remember that Title VII prohibits discrimination on the basis of race or sex and the prohibition protects nonminorities "upon the same standards" as minorities. *McDonald v. Santa Fe Trail Transportation Co.,* 427 U.S. 273, 281 (1976). In *Weber* the Court created a limited exception because of the compelling interest in eliminating the lingering effects of the once closed doors of opportunity. Without any past discrimination, the compelling reason for the exception does not exist and the general rule of nondiscrimination should apply. Hence, the lack of a remedial purpose renders the respondent's race and sex preferences violative of Title VII.

II

THE NINTH CIRCUIT ERRONEOUSLY HELD THAT THE AGENCY'S AFFIRMATIVE ACTION PLAN WAS TEMPORARY

The Ninth Circuit Court of Appeals concluded that "the Agency plan is sufficiently temporary." 770 F.2d at 757. This conclusion is erroneous for several reasons. First, the temporary or indefinite nature of the plan is a question of fact to be determined by the trier of fact, the District Court, and not the Court of Appeals. *Anderson v. City of Bessemer City,* — U.S. —, 84 L. Ed. 2d 518 (1985) (Court of Appeals improperly reversed the trial court's finding of discrimination in violation of Title VII).

In *Anderson* this Court recently explained the "clearly erroneous" standard regarding appellate review of findings of fact.

> "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." Fed. R. Civ. P. 52(a).

The significance of the "clearly erroneous" standard is the extreme strictures it places on a Court of Appeals' ability to reverse findings of fact.

> "If the district court's account of the evidence is plausible in light of the record reviewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *Anderson,* 84 L. Ed. 2d at 528.

In the present case, the District Court found that the "Affirmative Action Plan had no end-date *or other provision which would have the effect of ending preferential*

treatment to women." Appendix to Petition at 13a, Paragraph No. 24 (emphasis added).

Although the appellate court's concern over technicalities in drafting is legitimate, the Agency had the opportunity to show the plan's temporary nature when it drafted the plan and at trial. The Agency certainly had the incentive to prove temporariness since the law is clear that race and gender preferences must be temporary. *See Weber*, 443 U.S. at 208; *Johnson*, 770 F.2d at 757. The Agency did not prove that the plan was temporary to the satisfaction of the trier of fact.

The District Court specifically relied on the absence of a termination date for the affirmative action plan and the Agency director's testimony that the plan was intended to be permanent. The trial court's finding that the plan was not temporary is a permissible view of the evidence. The Court of Appeals reversed the finding on the basis that the goal of the plan was to "attain" a gender balance. The court reasoned that the choice of the word "attain" requires an end of the plan upon attainment of the goal. *Johnson*, 770 F.2d at 756-57.

The issue is not whether the Court of Appeals' conclusion is reasonable or more reasonable than that of the trier of fact. Since the trial court's conclusion is supported by the evidence, its finding that the plan was not temporary cannot be clearly erroneous. *Anderson*, 84 L. Ed. 2d at 528.

Second, the Court of Appeals' decision ignores *Weber's* prohibition of a maintenance of race and gender balances. *Weber*, 443 U.S. at 208. Here the court held that

preferences may be used to eliminate imbalances not caused by discrimination. *Johnson*, 770 F.2d at 758 n.4. Preferences to eliminate the present effects of past discrimination operate in the following manner. Preferences are used to reach the appropriate balance and then end. If an imbalance occurs later which is not a result of discrimination, the preferences cannot be reinstated. Otherwise, the employer would be maintaining balances.

If the mere presence of imbalance alone will justify race and gender preferences, an employer may "attain" a balance one year and then an imbalance may recur the next year. The new imbalance under the appellate court's theory would justify suspect preferences again. If this scenario is not a *maintenance* of race and gender balances, then nothing is. The Court of Appeals has almost erased *Weber's* prohibition on the employer's maintaining balance by attempting to justify preferences because of an imbalance not caused by discrimination.

III

THE NINTH CIRCUIT ERRONEOUSLY HELD THAT THE AGENCY'S AFFIRMATIVE ACTION PLAN DOES NOT UNNECESSARILY TRAMMEL THE INTERESTS OF NONPREFERRED EMPLOYEES SUCH AS THE PETITIONER

This Court in *Weber* justified the affirmative action program because the "plan does not unnecessarily trammel the interests of the white employees." 443 U.S. at 208. The Court made clear that a requirement that white employees be laid off to make room for black employees or an

"absolute bar to the advancement of white employees" would violate this test. *Id.* The trial court held that the Agency's affirmative action plan does unnecessarily trammel the petitioner's interests. Appendix to Petition at 14a, Paragraph No. 7.

Whether petitioner was not promoted because of his gender is not an issue in this case. The District Court held as a matter of fact and the Court of Appeals did not disagree, that his gender was the reason he was not promoted, a reason expressly prohibited by Title VII. The issue in this case is whether the Agency's affirmative action plan provides a defense to the otherwise illegal conduct. The validity of an affirmative action plan as a defense to a charge of discrimination depends on the court's review of the plan as a whole and not merely as applied. A narrow review of a plan as applied would never constitute a defense because the focus would be on the person discriminated against such as the petitioner here or the white employees in *Weber*. In order to constitute a defense, the affirmative action plan must be limited in its operation to the purpose of eliminating the vestiges of past discrimination and by procedural constraints similar to those in *Weber*.

The affirmative action plan in *Weber* operated in the following manner. Trainees for the craft training program would be chosen on the basis of seniority. Half of the positions were to be filled by black trainees until the percentage of black skilled craftworkers approximated the percentage of blacks in the community labor force. *Weber*, 443 U.S. at 199. Although the Court's description of the

procedural working of the affirmative action was minimal, it was significantly more specific than the Agency's 64-page affirmative action plan in the present case.

The Agency's plan refers to the goal to "attain a work force which includes in all occupational fields and at all employment levels minorities, women and handicapped persons in numbers consistent with the ratio of these groups in the area work force." Affirmative action plan at 1. Although the Agency's goal is arguably consistent with the goal of the plan in *Weber*, the Agency's plan does not specify to what extent preferences will be given and to what degree nonminority male employees' interests may be trammeled. " 'If there is no meaning in it,' said the King, 'that saves a world of trouble, you know, as we needn't try to find any.' " L. Carroll, *Alice's Adventures in Wonderland* 121 (1966) (Macmillan). Although such imprecision may satisfy the King of Hearts, the Court should demand more specificity if the plan will be a complete defense to gender discrimination.

Instead, the plan depends on "the initiative, imagination and resourcefulness of the Agency Personnel staff" to meet the goals. Affirmative action plan at 9. The plan contains no limits on the degree to which the Agency will give preferences to underrepresented groups. At least the plan in *Weber* was limited to 50% and seniority. The Agency's plan may constitute a reservation of 100% of all promotions to women.

"Absolute discretion, like corruption, marks the beginning of the end of liberty." *New York v. United States*, 342 U.S. 882, 884 (1951) (Cardozo, J., dissenting memorandum). Although an employer must be given discretion

in regard to employment matters, an employer who raises an affirmative action plan in defense of otherwise discriminatory conduct must have a plan which does not encourage discrimination in the exercise of discretion. The Agency's plan fails to limit both discretion and discrimination. The petitioner's and other male employees' interests are caught in the web of this ambiguous plan.

The language of the plan combined with its absence of limits invites race and gender discrimination. The Court has in other contexts disapproved unbridled discretion which encourages discriminatory treatment. *See, e.g., Smith v. Goguen*, 415 U.S. 566, 567 (1974) (flag misuse statute void because of vagueness and not on First Amendment grounds). The vagueness doctrine "requires legislatures to set reasonably clear guidelines for law enforcement officials and triers of fact in order to prevent 'arbitrary and discriminatory enforcement.'" *Id.* at 572-73. *See also Shuttlesworth v. Birmingham*, 394 U.S. 147 (1969) (unbridled discretion of permit giver may lead to discriminatory actions; therefore, ordinance is invalid); *Industrial Union Department v. American Petroleum Institute*, 448 U.S. 607, 685-86 (1980) (Rehnquist, J., concurring) (delegations require some standards which limit agency actions).

The very wording of the plan encourages discrimination and places no limitations on the extent of the sex and race preferences. Unlike the plan in *Weber*, the Agency's plan gives no assurance that male employees' interests will not be unnecessarily trammeled. Hence, the Agency's actions are unjustifiable.

CONCLUSION

In his Principles of Newspeak, George Orwell explained the new vocabulary.

> "No word in the B vocabulary was ideologically neutral. A great many were euphemisms. Such words, for instance, as *joycamp* (forced labor camp) or *Minipax* (Ministry of Peace, i.e., Ministry of War) meant almost the exact opposite of what they appeared to mean." Orwell, *Nineteen Eighty-Four* in *Orwell's Nineteen Eighty-Four: Text, Sources, Criticism* 135 (1963) (emphasis in original).

It is unfortunate that the pleasing phrase of "affirmative action" has often been used to describe a method of discrimination, in a manner similar to the Orwellian B vocabulary. In order to constitute a defense to gender based employment decision, any plan must be limited by more than the label of affirmative action. It must contain the limits the Court recognized in *Weber*.

The Court of Appeals erroneously held that gender imbalance not caused by discrimination was enough to justify new discriminatory treatment of employees. Furthermore, the court improperly reversed the trial court's finding of fact that the plan was not temporary. Finally, the plan in the present case encourages discriminatory hiring practices and places no limits to protect against such discrimination. The plan thus fails to protect the interests of male employees from being caught in the workings of the plan by the initiative, imagination, and resourcefulness of the plan's implementors. Because of these defects, the Agency's affirmative action plan does not provide a defense to the Agency's gender discrimination in violation of

Title VII. Amici urge that the decision of the Ninth Circuit be reversed.

DATED: August, 1986.

Respectfully submitted,

Of Counsel

RICHARD M. STEPHENS
Pacific Legal Foundation
555 Capitol Mall, Suite 350
Sacramento, CA 95814
Telephone: (916) 444-0154

RONALD A. ZUMBRUN
JOHN H. FINDLEY
*ANTHONY T. CASO
*COUNSEL OF RECORD
Pacific Legal Foundation
555 Capitol Mall, Suite 350
Sacramento, CA 95814
Telephone: (916) 444-0154

Attorneys for Amici Curiae